



LIBRARY OF CONGRESS

1410-72-P

Copyright Royalty Board

37 CFR Part 370

[Docket No. RM 2008-7]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges are amending a Copyright Royalty Board rule regarding reporting requirements for certain Educational Stations that pay no more than the minimum fee for their use of sound recordings under the applicable statutory licenses.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kimberly Whittle at (202) 707-7658 or at *crb@loc.gov*.

SUPPLEMENTARY INFORMATION:

Introduction

On May 2, 2014, the Copyright Royalty Judges (Judges) published a document in the **Federal Register** seeking comments on two unrelated rulemaking proposals (Proposal).¹ For the proposal that is the subject of this document the Judges requested comments on a proposed rule amendment to relax certain reporting requirements for educational stations that pay no more than the minimum fee for the use of sound

¹ See 79 FR 25038. The Judges continue to analyze the second rulemaking proposal, submitted by SoundExchange, Inc., and the comments responsive thereto.

recordings under the statutory licenses in Sections 112(e) and 114 of the Copyright Act. The Judges received over twenty comments on the proposal, most of which supported it. For the reasons discussed below, the Judges adopt the proposed amendment.

Background

On October 28, 2009, College Broadcasters, Inc. (CBI), American Council on Education (ACE), and Intercollegiate Broadcasting System, Inc. (IBS) (collectively, “Petitioners”) filed a motion with the Judges seeking clarification of an issue purportedly raised by final regulations that the Judges adopted regarding reporting requirements for entities that digitally transmit sound recordings pursuant to section 114(d)(2) of the Copyright Act or that make ephemeral phonorecords of sound recordings pursuant to section 112(e) of that Act.² *Joint Petition for Clarification, Notice and Recordkeeping for Use of Sound Recordings Under the Statutory License*, Docket No. RM 2008-7 (Oct. 28, 2009) (Joint Petition). The regulations at issue are found in 37 CFR 370.4, and they prescribe rules for the maintenance and delivery of reports of use (ROUs).³

For nonsubscription transmission services, except those qualifying as minimum fee broadcasters, the ROU must include the actual total performances of each sound recording during the reporting period. 37 CFR 370.4(d)(2)(vi). Minimum fee broadcasters, however, may report, as an alternative to actual total performances, the

² The release adopting the regulations appeared in 74 FR 52418 (Oct. 13, 2009). The applicable rules are codified in 37 CFR part 370.

³ An ROU is a report required to be provided by an entity that transmits sound recordings pursuant to the statutory licenses in section 114(d)(2) or that makes ephemeral recordings of sound recordings pursuant to section 112(e) of the Copyright Act. 37 CFR 370.1(i). ROUs must be delivered to the Collective designated by the Judges (currently SoundExchange, Inc.). *See, e.g.*, 37 CFR 370.4(c). ROUs must include the name of the entity making the transmissions, a category transmission code, the featured artist of the sound recording, and the sound recording title, among other information. The current proceeding is focused only on the reporting requirements of “nonsubscription transmission services,” which are entities that provide audio programming consisting of performances of sound recordings. *See* 37 CFR 370.1(e). Such services are often referred to as webcasters.

aggregate tuning hours, the channel or program name, and play frequency. 37 CFR 370.4(d)(2)(vii).

Whereas most services must prepare an ROU for each calendar month of the year, a minimum fee broadcaster need only prepare an ROU for a two-week period for each calendar quarter of the year. 37 CFR 370.4(d)(3).⁴ However, the regulations exempt minimum-fee broadcasters from the census reporting requirement (*i.e.*, the requirement to report actual total performances) only if their stations are licensed by the Federal Communications Commission (FCC) because the FCC licensing is part of the definition of “broadcaster.” Petitioners asked that the Judges “clarify” that the regulations also exempt minimum-fee broadcasters that are not FCC-licensed broadcasters if they are “educational” in nature. Joint Petition at 2-4.

After reviewing the Joint Petition, the Judges concluded that Petitioners were not seeking a clarification of the final regulations but rather were seeking a substantive change. In other words, the “clarification” that the Petitioners sought actually amounted to a request to amend the census reporting requirement regulations to exempt non-FCC-licensed minimum-fee *educational webcasters*. The Judges thus determined that Petitioners’ petition for clarification should be treated as a petition for rulemaking and made the Joint Petition subject to notice and public comment.⁵

On May 2, 2014, the Judges published the Proposal in the **Federal Register** seeking comments on the Petitioners’ proposal.⁶ The Judges requested comments on not

⁴ The weeks need not be consecutive but both must be completely within the calendar quarter. 37 CFR 370.4(d)(3)(ii).

⁵ 79 FR at 25039.

⁶ 79 FR 25038. In the interest of administrative efficiency, the Judges also sought comments in the same notice on an unrelated petition for rulemaking that SoundExchange submitted. SoundExchange’s proposal,

only the Petitioners' principal proposal, which would exempt non-FCC-licensed minimum fee educational webcasters from the census reporting requirement, but also on a broader alternative proposal that Petitioners proffered that would expand the census reporting exemption to entities that are noncommercial webcasters but that would not be considered educational entities under the Petitioners' proposal.

In response to the Proposal, the Judges received approximately twenty-four comments.⁷ No commenter opposed the Petitioners' proposal for educational webcasters. SoundExchange did, however, oppose Petitioners' broader alternative proposal to exclude from the census reporting requirements noneducational noncommercial webcasters. As discussed below, the Judges are adopting the Petitioners' proposed exemption for non-FCC-licensed educational broadcasters, but are not adopting the broader noncommercial webcaster exemption.

Petitioners' Rule Proposal

Petitioners propose that the definition of a "minimum fee broadcaster" in 37 CFR 370.4(b)(3) be amended to include a nonsubscription service that: (1) is directly operated by, or affiliated with and officially sanctioned by a domestically accredited primary or secondary school, college, university, or other post-secondary degree-granting educational institution; and (2) the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled in such institution;

which requested a broad range of changes to CRB rules, is still pending. The current release addresses only the census reporting requirement proposal submitted by the Petitioners.

⁷ The Judges received comments that addressed in some fashion the Petitioners' proposal from the following: All-Campus Radio Network (ACRN), Andrea Baker, CBI, IBS, KBCU-FM, KBHU-FM, KNHC, KSSU, KUIW, KWSC-FM, KXUL, Lasell College Radio, the National Association of Broadcasters and Radio Music License Committee (NAB/RMLC), NPR, SCAD Atlanta Radio, SoundExchange, WBSU, WGSU-FM, WJCU, WKNC-FM, WRFL-FM, WSDP-FM, WSLX, and WSOU-FM (Seton Hall University).

and (3) is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting (CPB) pursuant to the criteria set forth in 47 U.S.C. 396; and (4) is exempt from taxation under section 501 of the Internal Revenue Code, has applied for such exemption, or is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes. *Joint Petition* at 2 n.1. While the proposed language upon which the Judges requested comments did not incorporate CBI’s singular reference to “Educational Stations,” the proposal retained the substance of the Petitioners’ proposal.

In the Proposal soliciting comment on the proposal, in addition to seeking comments on the proposal generally, the Judges also sought comments on certain specific issues. In particular, the Judges sought comment on how unlicensed minimum fee “Educational Stations,” as that term would be defined in Petitioners’ proposal, have been reporting under the current regulations. The Judges also asked whether any such entities have ceased operations, as predicted by Petitioners and if so, how many. If none ceased operations, the Judges asked whether the need still exists for Petitioners’ proposed amendment. The Judges also asked whether Petitioners have, in the first instance, made their case persuasively that the proposed amendment is warranted. If the change is warranted, the Judges asked whether they should adopt (1) Petitioners’ preferred definition, which applies only to Educational Stations, or (2) the broader, alternate definition.⁸

Comment Summary

⁸ 79 FR at 25040.

Of the 24 comments the Judges reviewed, none opposed the specific language included in the Proposal, although, as discussed below, SoundExchange opposed adopting a more expansive exemption from the census reporting requirements for noncommercial webcasters that are not affiliated with an educational organization.

All-Campus Radio Network's (ACRN) comment is illustrative of those that supported the proposal. Because it has no FCC license, ACRN cannot qualify as a "minimum fee broadcaster" under 37 CFR 370.4(b)(3).⁹ ACRN is, however, a Noncommercial Educational Webcaster (NEW) as defined in 37 CFR 380.21.¹⁰ As such, ACRN has a reporting waiver under 37 CFR 380.23(c) and (g)(1), which authorizes payment to the Collective of a \$100 proxy fee in lieu of maintaining and delivering ROUs. ACRN would like to continue to report as a NEW indefinitely.¹¹ In the alternative, ACRN supports the proposal to change 37 CFR 370.4(b)(2) so that ACRN

⁹ Section 370.4(b)(3) states that a *minimum fee broadcaster* is a nonsubscription service that meets the definition of a broadcaster pursuant to § 380.2(b) and the service's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114. At the time of the motion for clarification 37 CFR 380.2 defined a broadcaster as a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

¹⁰ Under § 380.21, a NEW is a noncommercial webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that has obtained a compulsory license, complies with all applicable provisions of the license, is operated by or affiliated with and sanctioned by a primary or secondary school, college or university or other degree-granting educational institution, and is not a public broadcasting entity qualified to receive funding from the CPB. 17 CFR 380.21. As part of the supporting regulations for the Section 112 and 114 webcasting licenses, § 380.21, by its terms, expires at the end of each licensing period (currently December 31, 2020). See 37 CFR 380.20(a). The most recent iteration of § 380.21, which was adopted after comments in the current rulemaking proceeding were filed, includes an additional requirement that the noncommercial webcaster take affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month. 37 CFR 380.21 (2015).

¹¹ As part of the supporting regulations for the webcasting licenses, the reporting waiver expires every five years, unless it is renewed.

would qualify as a minimum fee broadcaster.¹² It views this option as less desirable, however.

KBCU-FM, KBHU, KNHC, KSSU, KWSC-FM, and KXUL all generally concurred with the position of ACRN. KUIW and Lasell College Radio, which also support the proposal, state that they would probably have to cease broadcasting if the reporting provision for NEWS were to expire and they could not qualify as minimum fee broadcasters.¹³

CBI supports continuing the reporting requirements in § 380.23, which were negotiated as part of a settlement with SoundExchange, because, according to CBI, those requirements are simpler to follow and impose fewer obstacles than the rules with which non-NEWS must comply. *CBI Comment* at 5. CBI states that it conducted a survey and determined that fewer than 13% of non-FCC-licensed stations are currently able to report actual total performance (ATP) data. According to CBI, fewer than 18% of those stations reported that they would be able to find a means to comply with full census ATP reporting should the requirements in § 380.23 be allowed to expire and the proposed regulations in the Joint Petition not be adopted.¹⁴ Neither CBI nor any other commenter provided data on any non-licensed entity that ceased operation due to the ROU reporting

¹² ACRN states that the proposed changes are “warranted *only* if the alternative to report under 380.23 were to not sunset [sic].” *ACRN Comment* at 3, emphasis in original. Read in the context of the ACRN letter as a whole, it appears that ACRN meant that the proposed changes would be warranted only if the alternative to report under 380.23 *were* to sunset.

¹³ KUIW Comment at 1-2. Lasell Comment at 1-2. Each commenter recommends that the reporting requirements applicable to NEWS be made permanent. Such a recommendation is beyond the scope of the proposal upon which the Judges sought comment in the current proceeding. As such, the Judges do not have adequate support in the record to support adopting such a proposal.

¹⁴ Andrea Baker supports applying the Petitioner’s preferred definition of “minimum fee broadcaster” because, according to Ms. Baker, the proposal is more likely to move users of sound recordings away from reporting of sampled data. The proposal would in fact allow *more* users to choose to report sampled data. Through 2020, however, to the extent they qualify to pay the proxy fee in lieu of reporting, the users that would benefit from the proposal are not reporting any sound recording play data.

requirement. That being said, the great majority of commenters that are subject to the ROU reporting requirement appear to be paying the \$100 proxy fee in lieu of reporting (an alternative that is now available through 2020). *See Determination (final), Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web-IV)*, Docket No. 14-CRB-0001-WR (2016-2020) (Mar. 2, 2016).

Not surprisingly, IBS also supports its Joint Petition. IBS adds that it agrees with SoundExchange's position that NEWs with fewer than 55,000 aggregate tuning hours (ATH) per month should be permitted to pay an annual \$100 proxy fee in lieu of census reporting. IBS also contends that NEWs with fewer than 15,914 ATH monthly should pay a \$50 proxy fee and NEWS with fewer than 6,365 ATH monthly should pay a \$20 proxy fee. IBS believes that each of these categories should be exempt from the \$500 annual minimum fee. *Reply Comments of IBS* at 1. Because IBS made its suggestions in Reply Comments, the Judges were unable to include them in the Proposal, and therefore have no basis upon which to adopt them.

The National Association of Broadcasters (NAB) and the Radio Music License Committee (RMLC) advocate an exemption from all reporting requirements for broadcasters that currently pay the minimum fee of \$500. They contend that many of these entities are already exempt from reporting requirements as long as they pay the \$100 annual proxy fee (*i.e.*, small broadcasters that stream no more than 27,777 aggregate tuning hours (ATH) and noncommercial educational webcasters that stream less than 55,000 annual ATH). Moreover, according to NAB, most of these entities play "mainstream" music that larger broadcasters play so the allocations of royalties paid by

these entities could be made based on playlist data collected from larger broadcasters. *NAB/RMLC Comment* at 51-52.

According to National Public Radio, Inc. (NPR), the current recordkeeping and reporting system is the result of a settlement agreement between SoundExchange and the CPB. NPR estimates that about 402 stations operate under the agreement. *NPR Comment* at 7. NPR notes that it aggregates the reports of each of these stations and reports directly to SoundExchange on behalf of all the stations. NPR states that it currently operates under the settlement agreement with SoundExchange, and, as a result, it is not subject to certain of the reporting and recordkeeping requirements in the regulations. NPR believes, however, that the regulations should be flexible to allow parties that are not parties to agreements to be able to use the license in a manner that is not overly burdensome. *NPR Comment* at 1-3.

SCAD Atlanta Radio¹⁵ is a NEW under 37 CFR 380.21. It is a web-only, student-run station and does not have an FCC license so it cannot qualify as a minimum fee broadcaster under 37 CFR 370.4(b)(3). As a NEW, SCAD Atlanta pays the proxy fee in lieu of reporting, as permitted under 37 CFR 380.23. It would like to continue to report that way and therefore requests that the sunset provisions in the regulations be removed. In the alternative, SCAD Atlanta supports the proposed change to 37 CFR 370.4(b)(2), which would qualify SCAD Atlanta as a minimum fee broadcaster if the NEW designation sunsets. SCAD Atlanta states that if it lost the ability to report as a NEW and

¹⁵ SCAD Atlanta states that the station is produced by students at the Atlanta location of the Savannah College of Art and Design. The Judges also received a substantially identical comment from “SCAD Radio,” which states that the station is produced by students at the Savannah location of the Savannah College of Art and Design.

was forced to report monthly census data, the station would face considerable hardship and expense. *SCAD Atlanta Comment* at 2.

In its initial comment, SoundExchange stated that the Joint Petition is moot through 2015 (and now presumably through 2020). According to SoundExchange, pursuant to 37 CFR 380.23(g)(2), a NEW with usage at a level covered by the minimum fee is currently permitted to provide ROUs on a sample basis as contemplated by proposed § 370.4(b)(2) and is even excused from reporting its ATH. *SoundExchange Comment* at 3. SoundExchange notes that such services report play frequency in lieu of reporting ATH or actual total performances.

SoundExchange states that the vast majority of NEWs are not even required to provide sample ROUs. SoundExchange states that, pursuant to 37 CFR 380.23(g)(1), NEWs with the lowest intensity of usage may elect to pay a proxy fee of \$100 and forgo providing ROUs altogether. According to SoundExchange, for 2013, 97% of NEWs elected this reporting waiver and were not required to provide any ROUs. As a result of the *Web-IV* Determination, § 380.23(g)(1) and (2) remain in effect through 2020, at which point the Judges will determine rates and terms for the next rate period (2021-2025) (*Web-V*).

Nevertheless, SoundExchange does not oppose the Petitioners' proposed definition of "Minimum Fee Broadcaster" for § 370.4(b)(2). SoundExchange highlights certain technical errors in the proposal (*i.e.*, SoundExchange opines that there should be a comma following the phrase "officially sanctioned by" in § 370.4(b)(2)(ii) and the reference in proposed § 370.4(b)(2)(iv) should be Section 118(f) (rather than 118(g)).¹⁶

¹⁶ The Judges adopted these technical corrections in the final regulation.

SoundExchange also recommends changing the proposed term from “Minimum Fee Broadcaster” to “Eligible Minimum Fee Webcaster” (or the like) to more accurately reflect the fact that certain of the services covered are not broadcasters. *SoundExchange Comment* at n.2.¹⁷ According to SoundExchange, adoption of this proposal “seems like a reasonable deviation from the important principle of census reporting.” *SoundExchange Comment* at 4.

SoundExchange does not support the broader alternative proposal to include internet-only noncommercial webcasters that are not educational webcasters (which are not currently covered by § 380.23(g)(2)). For such webcasters, if they are staffed by professionals or use modern content management technology capable of readily generated ROUs on a census basis, they should not be exempted from census reporting just because they are low-intensity noncommercial users. SoundExchange does not believe that the Petitioners have made the case for a broader exemption. *SoundExchange Comment* at 4.

While SoundExchange is not opposed to the narrow proposed definition of Minimum Fee Broadcaster in § 370.4(b) (with the technical corrections discussed above), SoundExchange notes that “NEWs would like to include in the notice and recordkeeping regulations the outright reporting waiver and play frequency reporting provisions of Section 380.23(g), but not the late fee for ROUs provided in Section 380.23(e) or the server log retention provisions of Section 380.23(i).” *SoundExchange Reply Comments* at 7. SoundExchange does not believe that NEWs should be given their requested

¹⁷ The Judges believe that the term “eligible minimum fee webcaster” more accurately reflects the fact that some of the entities covered by the definition would not satisfy the applicable definition of broadcaster and therefore accept SoundExchange’s suggestion in the adopted regulation.

“special exemption” in these regulations because, according to SoundExchange, “their concerns are addressed directly in the terms to which CBI agreed.” *SoundExchange Reply Comments* at 8.

SoundExchange does not believe it is fair for NEWs to pick and choose their favorite provisions from § 380.23 that were negotiated by CBI. SoundExchange notes that the agreement to settle the *Web IV* proceeding as to NEWs on a basis that would generally extend the relevant provisions of § 380.23 moots the issues raised in the Joint Petition through 2020. Anticipating the adoption of such agreement, which the Judges adopted during the *Web IV* proceeding, SoundExchange found no reason for the Judges to adopt the proposals in the NPRM based on the Joint Petition. SoundExchange speculates that under such a scenario, the Judges could revisit the question of reporting by NEWs based on a fresh record in five years. Otherwise, SoundExchange recommends that the Judges either adopt the equivalent of all the relevant provisions of § 380.23 (*i.e.*, the proposed late fee for ROUs and proposed recordkeeping provisions) or adopt only the changes to the definition of Minimum Fee Broadcaster proposed in the NPRM.

SoundExchange Reply Comments at 9.

SoundExchange Settlement with CBI

In the context of the *Web IV* proceeding, the Judges were presented with two settlements that bear on the reporting requirements at issue in this rulemaking.¹⁸ In one settlement, SoundExchange and CBI requested that the Judges adopt their agreement as a partial settlement of rates and terms under Section 112(e) and 114 of the Copyright Act

¹⁸ See 80 FR 58201 (Sept. 28, 2015) (adopting proposed settlement between SoundExchange and CBI) and 80 FR 59588 (Oct. 2, 2015) (adopting proposed settlement between SoundExchange and NPR and the CPB).

(Act) for eligible nonsubscription transmissions by NEWs over the internet, and related ephemeral recordings. In the **Federal Register** document adopting the

SoundExchange/CBI settlement, the Judges noted:

Commercial webcasters are required to make detailed, census reports of all sound recordings they transmit. NEWs with limited listenership may pay the Collective a proxy fee to avoid the burden of census reporting.... A NEW electing the reporting waiver in 37 CFR 380.23(g)(1) must pay a \$100 annual proxy fee to the Collective. Proposed Rule 37 CFR 380.22(a).¹⁹

In adopting the SoundExchange/CBI Settlement, the Judges noted the relevance of the Settlement to the current rulemaking proceeding:

Many if not most of the comments responsive to the proposed recordkeeping provisions were filed by NEWs that apparently would qualify under the proposed Settlement to pay the proxy fee *in lieu* of census reporting in the upcoming license period. Extension until December 31, 2020, of the proxy fee *in lieu* of census reporting does not, however, address the precise issue raised in that rulemaking proceeding. The Judges shall address this issue along with a number of other issues relating to Part 370 in a separate publication focused directly on the May 2, 2014, Notice of Proposed Rulemaking.²⁰

In other words, although the SoundExchange/CBI settlement provided a means for qualifying NEWs to pay a \$100 proxy fee in lieu of census reporting through December 31, 2020, it does not, as the current proposal would, provide a permanent means for entities that meet the proposed definition of noncommercial educational webcasters to pay the proxy fee in lieu of census reporting. In light of the overwhelming support in favor of such a reporting waiver and the lack of opposition, the Judges find that adopting the proposed alternative for a permanent exemption from census reporting requirements is beneficial and consistent with the Copyright Act.

¹⁹ 80 FR at 58201.

²⁰ 80 FR 58201, 58205 (Sept. 28, 2015).

Given their adoption of the proposed exemption, the Judges decline to adopt a broader alternative proposed by Petitioners. Notwithstanding the unique stature of NEWs as noncommercial entities with an educational mission, the Judges do not believe extending the exemption to other noncommercial webcasters would be consistent with the policy intended to ease reporting obligations on NEWs. As discussed by some of the commenters, NEWs are often student-operated stations. The students generally perform station operations to supplement their academic pursuits during a given academic term. As a rule, with semester and summer breaks, the stations lack operational continuity.

Without a paid administrative staff and adequate financial and technological support, census reporting would present a significant challenge for those stations that could cause the educational institution to discontinue the stations to avoid the administrative burdens. Neither the students, the educational entity, nor the artists would benefit from elimination of the campus stations. The Judges agree with SoundExchange, however, that noncommercial noneducational webcasters have not made the case that they face the same challenges. Therefore, the Judges decline to extend the reporting requirement exemption to noncommercial webcasters that do not have the requisite affiliation with an educational institution.

SoundExchange contends that in light of the agreements SoundExchange, CPB, CBI, and NPR reached during the *Web IV* proceeding, which the Judges adopted, the current rulemaking is moot, at least through 2020. While the Judges agree that many webcasters that are eligible for either of the agreements will choose to pay the proxy fee in lieu of reporting, each such agreement has conditions and limitations that would not apply with respect to the proposal the Judges adopt today. Moreover, by adopting the

proposal in the Petition as a permanent rule, the Judges provide certainty that, even if the current agreements are not extended in subsequent rate periods, eligible noncommercial educational webcasters will be able to avail themselves of the reduced reporting requirements in § 370.4, regardless of whether they are licensed with the FCC. Such certainty is sufficient justification for adopting the proposal.

Final Regulations

In consideration of the foregoing, the Copyright Royalty Judges amend 37 CFR part 370 as follows:

PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

1. The authority citation for part 370 continues to read as follows:

Authority: 17 U.S.C. 112(e)(4), 114(f)(4)(A).

2. Revise § 370.4(a) and (b) to read as follows:

§ 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules for the maintenance and delivery of Reports of Use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment

services.

(b) *Definitions.* For purposes of this section, the following definitions apply:

Aggregate Tuning Hours means the total hours of programming that a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions, less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission service transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission service's Aggregate Tuning Hours would equal 10.

AM/FM Webcast means a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless

of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

Broadcaster means an entity that:

- (i) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;
- (ii) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;
- (iii) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and
- (iv) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Eligible Minimum Fee Webcaster means a nonsubscription transmission service whose payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114; and either:

- (i) Meets the definition of a broadcaster; or
- (ii) Is directly operated by, or affiliated with and officially sanctioned by, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(A) The digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled in such institution; and

(B) Is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(f)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396; and

(C) Is exempt from taxation under section 501 of the Internal Revenue Code, has applied for such exemption, or is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Minimum fee broadcaster means a nonsubscription service that meets the definition of a broadcaster and the service's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114.

Performance means each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Play frequency means the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the play frequency is 10.

* * * * *

Dated: May 10, 2016.

Approved by:

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

David S. Mao,
Acting Librarian of Congress.

[FR Doc. 2016-11746 Filed: 5/18/2016 8:45 am; Publication Date: 5/19/2016]